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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

HOW FAR SUB-SURFACE RIGHTS IN LAND EXTEND.—The invention and development of aerial transportation revived the problem of determining the extent to which land ownership carried with it the ownership of air space. The recent decision by a *nisi prius* court in New York in *Boehringer v. Montalto et al.*¹ stimulated investigation of the other side of the problem, that is, to what depth beneath the surface does the ownership of land extend.

This decision, challenging the power and force of the old maxim *cujus est solum, ejus est usque ad coelum et ad inferos*, came in a suit to foreclose a purchase-money mortgage on property in the City of Yonkers. The defendant, who had purchased the premises from the plaintiff by a full covenant deed, counter-claimed for a breach of the covenant against incumbrances, on the ground that, after the purchase, defendant discovered that the Bronx Valley sewer commission had procured by condemna-

¹ 254 N. Y. S. 276.

tion the right to construct and maintain a sewer through the premises and had accordingly constructed the sewer across the property at a depth of over 150 feet. The condemnation judgment gave no right of access from the surface of the property, and there was no claim that defendant's use of the surface was in any way disturbed. The opinion also indicates that the property was improved with a residence building of the size usually found in the residential areas of any city.

The trial court came to the conclusion that the presence of the sewer was not an incumbrance so as to constitute a breach of the covenant against incumbrances and denied the counterclaim saying: "It therefore appears that the old theory that the title of an owner of real property extends indefinitely upward and downward is no longer an accepted principle of law in its entirety. Title above the surface of the ground is now limited to the extent to which the owner of the soil may reasonably make use thereof. By analogy, the title of an owner of the soil will not be extended to a depth below ground beyond which the owner may not reasonably make use thereof. It is concluded that the depth at which the Bronx Valley sewer exists is beyond the point to which the owner can conceivably make use of the property, and is therefore not an incumbrance."² In arriving at this decision the trial judge relied upon and cited but two cases, *Butler v. Frontier Telephone Company*,³ and *Smith v. New England Aircraft Company*,⁴ neither of which supports the conclusion reached.

The *Butler* Case involved the right of the plaintiff to maintain ejectment against a telephone company which had strung a wire across his land at a distance of twenty feet above the surface. In granting plaintiff the writ and recognizing his ownership of the superincumbent air space, the New York Court of Appeals said: "The surface of the ground is a guide, but not the full measure; for within reasonable limitations land includes not only the surface but also the space above and the part beneath. . . . The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly. . . . The extent of the decision, however, does not control; for an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath." In so holding the highest court of New York expressly recognized and adopted the ancient maxim with the possible exception that ownership up-

² *Ibid.*, 278.

³ 186 N. Y. 486.

⁴ 270 Mass. 511.

wards might be subjected to a reasonable limitation, a point to be determined later in a proper case. Certainly this decision gives no support to the judgment of the trial court in the principal case.

The Smith Case was a much discussed decision involving aeronautic use of air-space, from which the doctrine was formulated that a state, in the exercise of its police power, or the United States, in the exercise of its power to regulate interstate commerce, might grant a privilege of flight⁵ over land at heights at which, and under such conditions that the flight will not unreasonably interfere with the rights of the surface owner. There can be no comment on this point, since, by the proper exercise of the police power, a state can, by statute, restrict the use of all property in the interest of the public at large. However, the decision takes nothing from the maxim stated except such as may properly be taken from any ancient rule of law by the exercise of the sovereign power of the state.

Careless reliance by the New York *nisi prius* court on isolated expressions in these two cases without recognizing the true rule applied by the New York Court of Appeals in the Butler Case, and allowing no weight to the statutory enactment considered in the Smith Case, led the trial judge into the construction of a false analogy between rights above the surface and rights below, which, in the case under consideration resulted in what amounted to judicial legislation.

At this point it might be appropriate to note that the right to lay and maintain the sewer involved in the Boehringer Case was acquired by the Bronx Valley sewer commission through judicial condemnation proceedings. The use of such proceedings, invoking the eminent domain power of the state, was a valid method of depriving the surface owner of a portion of his estate in a fashion recognized by all courts and constitutions. Doubtless the sewer commission was better advised than the trial court, because had they proceeded to install the sewer without the sanction of the condemnation judgment and before paying the award, they would have been guilty of a trespass, and, moreover, following the rule in the Butler Case, the owner could probably have maintained ejectment proceedings against them.

From this critical examination of the facts in the Boehringer Case and the authorities relied on, we are forced to the conclusion that the *cujus est solum* maxim is not properly disturbed by the doctrine there announced, and consequently the trial court must have erred in deciding against the counterclaim.

⁵ At most a trespass, since it usually involves a mere temporary passage through the superincumbent air.

The case suggests, however, the thought that possibly the maxim, like many another instrument of law, has become outworn, and that some more suitable standard should be adopted to meet changing conditions. But counsel conducting the case have not seen fit to appeal from the judgment,⁶ so it is unlikely that a court of last resort will have occasion to pass on the matter for a while. Meanwhile some observations on the maxim itself may be appropriate.

Cujus est solum, etc. seems to have been taken into the common law system of England from the Roman Civil Law. Goudy, while doubting the existence of the maxim in that system, says: "It . . . is consistent with Roman Law and would not have sounded strange to the juriconsults. The text that comes nearest to illustrating it is Venuleius (Dig. xliii, f. 22, par. 4) in which he tells us that the interdict *Quod vi aut clam* could be raised against any one who caused anything to project over another's burial place."⁷ The earliest recorded instance of its adoption seems to be found in the work of Accursius who lived from 1182 A. D. to 1260 A. D.⁸ Bracton recognized the principle in part at least, for, according to Holdsworth, he adopted the idea that all that was growing on the soil was the property of the owner of the soil.⁹ By transition it was taken up by Littleton, and later was presented to the legal profession by Coke in his monumental work on Littleton's *Institutes of the Laws of England* under the form "*cujus est solum ejus est summitas usque ad coelum*."¹⁰

Prior to Coke's time the courts of England had passed on the maxim and, in so doing, had treated it as a mere rule of construction offered to assist them in determining what the word "land" really meant. Coke noted these cases and approved

⁶ Letters from counsel in writer's possession.

⁷ Paul Vinogradoff, *Essays in Legal History*, (1913), p. 230, title, "Two Ancient Brocards."

⁸ In the Accursian Gloss to Justinian Dig. viii 2, par. 1, according to Goudy, (op. cit.) the maxim takes the form *cujus solum ejus esse debet usque ad coelum*. Franciscus Accursius (1182-1260) was a professor of law at the University of Bologna. He arranged in one body the almost innumerable comments and remarks upon the Justinian Code which had accumulated since the time of its adoption. Though written in barbarous Latin, his work had more method than that of any preceding writer. His eldest son Franciscus (1225-1293), also a professor of law at Bologna, was invited to Oxford by King Edward I, where he lectured in the years 1275 and 1276. English writers may have acquired the maxim from him. (See *Encyc. Brit.* (13th Ed.), Vol. 1, p. 134). A significant note in Bury v. Pope, Cro. Eliz. 118, attributes the maxim to the time of Edward I.

⁹ W. S. Holdsworth, *A History of English Law*, VII, 485.

¹⁰ I Co. Litt. (1st Amer. Ed.). Book II, Ch. I, p. 197, par. 4a.

Littleton's definition of "land," a part of which reads: "And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of air and all other things even up to heaven; for *cujus est solum ejus est usque ad coelum*, as is holden 14 H. 8, fo. 12; 22 H. 6, 59; 10 E. 4, 14; *Registrum Origin*, and in other bookes."¹¹ Two of the cases referred to therein support the idea that the maxim was but a convenient expression for the rule being applied at that early date, to-wit, that "land" might mean much more than the surface of the earth; the other cases cannot be traced.

The first of these cases involved an indictment for "feloniously taking and carrying away six boxes sealed and containing charters and muniments concerning an inheritance in certain lands." The defendant claimed that the charters, as well as the boxes, were touching to "land" and could not be the subject of a felony. In Exchequer Chamber, before a full court, it was held, "If a man give all his goods and chattels, charters will not pass with the rest, and therefore they are real property," and Yelverton, J., added, "Felony can be only in the taking of personal chattels, and a man cannot take my wardship feloniously because it is a real chattel;" so it was decided by all that the case in question was not a felony and the defendant was discharged.¹²

The other case arose out of a claimed trespass which was said to have occurred while the defendant was executing a distress for rent. The facts are not clear, but the defendant seems to have taken a mill-stone which formerly had been fastened to certain heavy timbers "belonging to" plaintiff's mill but which had been temporarily detached and was resting on the ground during the course of some necessary repairs. Plaintiff's counsel urged that the stone was still a part of the realty, and the court, though not quoting the maxim, said, "Notwithstanding that it was severed, it could not be distrained because it remained a part of the mill;" and Fitzherbert, the reporter, added "*Nota—quaere* whether the same rule would apply to an anvil belonging to a smith."¹³

¹¹ Ibid. The Yearbook 22 Hen. 6, fol. 59, cited as authority, contains the case of John C. v. T. C. W. C., decided at Hilary Term, 1443, involving an action in trover for certain pledges. No other case in point can be found during that term. Coke made another error in the citation 14 Hen. 8, fol. 12. The correct folio number is 6.

¹² Colepepyr v. Wody, 10 Ed. IV, 14, translated in Vol. 47 of the Publications of the Selden Society, Year Book Series, p. 124.

¹³ Wystow de Graies June v. Abbe of St. Albans, 14 Hen. 8, fol. 6, contained in Reprint of Yearbooks, (London, 1679) Part 2, p. 26, taken from the notes of Brooks & Fitzherbert.

By Coke's time (1552-1634) the rule had begun to take on a different complexion and was changing from a simple rule of construction to one of property.¹⁴ As evidence of the hardening in the rule two quotations are given, one from Coke's own reports. The first involved an action by the plaintiff for the stopping of light from his property, and the court said, "Yet the other may upon his own land and soil lawfully erect an house or other thing . . . and the other [plaintiff] can have no action; for it was his folly to build his house so near to the other's land."¹⁵ In the other case the maxim appears in the reported language of an English court for the first time. There Baten sued to prostrate a house which Sampson had built adjoining his own in London in such a fashion that a portion of Sampson's building overhung the plaintiff's house. No special nuisance was alleged, but the court gave judgment for the plaintiff, holding that by the overbuilding the defendant had prevented the plaintiff from building his house higher. The report of the case uses the maxim, and says, "Also *cujus est solum, ejus est usque ad coelum*. And therewith agrees 13 Hen. 8, 1."¹⁶ This decision established the maxim as a precedent to be followed at least so far as the upward extent of land ownership was concerned. .

When Blackstone wrote his *Commentaries on the Laws of England* it is not surprising, therefore, to find him defining "land" in no uncertain terms, and adding: "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards . . . downwards, whatever is in a direct line between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but everything under it, or over it. . . . by the name of land, which is *nomen generalissimum*, everything terrestrial will pass."¹⁷ The later English decisions have, in the

¹⁴ The history of the Rule against Perpetuities is curiously analogous. The mediaeval rules to preserve freedom of alienation were being evaded by the 16th century lawyers; so the courts of that day, in cases heard before them, laid down rules from time to time to meet the various devices employed by the landowners, varying in text and meaning as the subject of the grant varied. The general rule was not written down until 1685 A. D. (about the time when the maxim *cuius est solum, etc.* was appearing in the reports) in the Duke of Norfolk's case. Since then it has been adopted, with statutory changes, in every state in the Union, and remains today what is, in effect, a rule of property. Cf. Holdsworth, *History of English Law*, VII, 194-196.

¹⁵ *Bury v. Pope*, Cro. Eliz. 118 (1587).

¹⁶ *Baten's Case*, 9 Co. Rep. 53b (1611).

¹⁷ Blackstone, *Book II*, Ch. 2, p. 18.

main, followed this definition, and the English text-writers have adhered to the full extent of the maxim.¹⁸

It was at about this stage of the law that the American states took up the maxim, and, following the English cases and writers, they took it in its then hard and fast character, not as a mere rule of construction but as a rule of property, except as the several states, by charter or grant, provided otherwise.¹⁹ For many years thereafter, in some one or other of its variant forms, the maxim was quoted and applied by the courts with little questioning and practically no examination. It was adopted in France (operating under a civil law system) where it was enacted into the Code Napoleon as Article 552,²⁰ and in Germany, with an exception preserving to the Emperor certain rights in the minerals beneath the surface.²¹

The state of New York made early reference to the principle,²² and, in 1848, held that separate horizontal estates in the same piece of land were recognizable in law.²³ In this last case, the court treated the ownership of the surface as including a vested estate in the sub-surface strata which could be sold, conveyed, or inherited in the same fashion as any other land. The problem was again re-examined in New York in 1906, at the time of the decision in the Butler Case, and at that late date the highest court of New York did not see fit to depart from its earlier conception that "land" included more than ownership of the surface, though it did gratuitously add that insofar as air space over land was concerned: "*Usque ad coelum* is the upper bound-

¹⁸ Later English cases are *Keyse v. Powell*, 2 El. & Bl. 132, (1853) in which possession of the surface was regarded as presumptive possession of the sub-surface strata; *Lewis v. Branthwaite*, 2 Barn. & Ad. 437 (1831); and *Sparrow v. Oxford Railway Co.*, 2 DeG. M. & G. 94, (1852), in which the court could see no difference between one inch and one thousand feet below the surface so far as the owner's rights were concerned. Text-writers include Dart, *Vendors and Purchasers*, I, 129 (1888), and Williams, *Modern Law of Real Property*, p. 14.

¹⁹ *Painter v. Reece*, 2 Pa. St. 126.

²⁰ Stuart S. Ball, "The Jural Nature of Land," 23 Ill. Law Rev. 45, at p. 51.

²¹ Schuster, *Principles of German Civil Law*, p. 386.

²² *Provost v. Calder*, 2 Wend. 517 (1829), and *Wheelock v. Young*, 4 Wend. 647 (1830).

²³ *Canfield v. Ford*, 28 Barb. 336. For a similar case in Illinois, involving a breach of a covenant against incumbrances, see *Ibbetson v. Knodle*, 201 Ill. App. 373. *Catlin Coal Co. v. Lloyd*, 176 Ill. 275, also illustrates the horizontal division of land, it further holds that, after separation, possession of the surface for the statutory period will not create an estate in the sub-surface soil by way of adverse possession.

ary, and, while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man.'²⁴

Of a similar nature are the decisions in Illinois, particularly those with reference to sub-surface strata, and in this state also the ancient maxim has been treated as a rule of property. Three cases will serve to illustrate its application. In *Kamphouse et al. v. Gaffner*,²⁵ it was held: "Every license that authorizes such acts as are not only required to be performed upon the land, but which gives some usufruct of the land itself, is property—a grant of an incorporeal hereditament, and must be created and transferred by deed." Later the Illinois Supreme Court held that a building, erected by a common grantor of both parties, standing partly on plaintiff's lot and partly on that of the defendant, was owned in severalty between them, the line between the two estates in the building being the boundary line between the two estates in the land described in the two deeds, and consequently partition would not lie.²⁶ The third case involved the application of *cuius est solum, etc.* to sub-surface rights in land and furnishes a complete discussion of the subject. The language of the court there, in part, reads: "So the owner of the entire estate in a tract of land containing several distinct and separate minerals may, by apt conveyances, vest in each of several grantees distinct and separate estates in the tract," and, applying this principle, the court held that a grant of "all the coal in, under and throughout" certain described premises did not extend to other minerals for the conversion of which the defendant was held liable in trover.²⁷

A number of other cases have arisen in Illinois involving horizontal division of air space above the surface of land, and in each case the court has invoked the old maxim as an aid in reaching its decision.²⁸ Further examples, if they should be needed, of the value of horizontal division of property included within the term "land" as it is now known to law, can be found in the erec-

²⁴ *Butler v. Frontier Telephone Co.*, 186 N. Y. 486.

²⁵ 73 Ill. 453, quoting from the syllabus.

²⁶ *Stevenson v. Bachrach*, 170 Ill. 253.

²⁷ *Smoot v. Consolidated Coal Co.*, 114 Ill. App. 512. Trover was the proper action, not trespass, because the minerals had been severed by artificial causes and thereby became personal property.

²⁸ *McConnel v. Kibbe*, 43 Ill. 12; *Metropolitan West Side Elevated R. R. Co. v. Springer*, 171 Ill. 170, where damages were awarded for air space over private alley overhung by elevated railroad; and *Madison v. Madison*, 206 Ill. 534, an estate in the second and third floors of a building were regarded as real estate by analogy to separate estate in minerals after severance.

tion of such buildings as the Merchandise Mart and the Daily News Plaza in Chicago, and the Park Plaza development in New York, in each of which instances air space over railroad lands has been conveyed and appropriated as a separate estate independent of, though necessarily resting upon, the surface of the earth.

In the light of these decisions, and considering the fact that today the maxim has become a rule of property in many states,²⁹ it is extremely doubtful if judicial action should be permitted to upset vested estates by limiting land ownership to a "reasonable" depth as was attempted in New York. Though the expression *cuius est solum, etc.* seems to have rested originally on slender premises, or on generalization from an inadequate number of particulars, the exceptions to the rule being left out of view in its formulation, it has, nevertheless, become so definite a part of real property law that nothing less than statutory action should be permitted to alter it.

Moreover, in place of a definite boundary on land ownership within which the title holder may protect himself from the encroachment of other persons, the courts would be faced with the difficulty of determining what "reasonable" depth meant. What was "reasonable" one hundred years ago, would, today, be the cause of actual hardship and loss, as may be seen from the fact that in some parts of the world mines and wells extend to points as deep as six thousand feet,³⁰ while in the loop area of Chicago it is not uncommon to rest tall buildings upon concrete caissons reaching 125 feet below the surface,³¹ and it is beyond the power of man to predict what will be "reasonable" a hundred years hence. Yet the sewer will permanently obstruct the use of the property at the depth of 150 feet in the principal case, and after

²⁹ Other American decisions adopting the maxim or its principle are to be found in *Isham v. Morgan*, 9 Conn. 377; *Adam & Others v. The Briggs Iron Company*, 61 Mass. 361; *Johnson v. Richardson*, 33 Miss. 462; *Vansickle v. Haines*, 7 Nev. 249; *Brocket v. Ohio and Pennsylvania Railroad Co.*, 14 Pa. St. 241; *Hague et al. v. Wheeler et al.*, 157 Pa. St. 324; *Murphy v. Bolger*, 60 Vt. 723; *Low v. County Court*, 27 W. Va. 785.

³⁰ The Juan del Rey coal mine in Brazil is 6,726 feet deep; an oil well in Logan County, Okla., measures 6,000 feet; and the diamond mines at Kimberley, South Africa, were at the 2,600 foot level in 1905. *Encyc. Brit.* (14th Ed.), Vol. 5, p. 875, Vol. 17, p. 666, and Vol. 7, p. 318.

³¹ Caissons reaching to bed-rock in the Chicago area vary according to location. At 16th and State Sts., the Beatrice Creamery Building, stands on pillars extending 80 feet below the street level, while the Tribune Building is supported on pillars 125 feet deep. (Records of the Chicago Building Commissioner.) The presence within that area of sewers, tunnels, etc., would detract materially from the value and the use to which such property could be put, and would involve grave engineering problems.

the passage of a hundred years, when the property owner might possibly have use for the subsoil at such a depth, he will find himself barred from what should be his estate therein.

Real property law grew slowly, and, by reason of the many estates and rights dependent on it, should change equally slowly. The maxim *cuius est solum, etc.*, no matter how vague or spurious its antecedents may have been, has now become a respected principle of law, and courts should be slow to reject it. They should rather keep in mind the wisdom of Blackstone's words that the "ends of civil society, the peace and security of individuals," are promoted "by steadily pursuing that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner."³²

POWER OF THE HUSBAND TO DEFEAT WIFE'S STATUTORY RIGHTS IN HIS PROPERTY UPON HIS DEATH.—Can a husband by the simple device of a deed of trust, whereby he retains a full interest in the property with a right to revoke and where there is an express intention to prevent the wife from succeeding to any interest in the property upon the death of the husband, deprive the wife of her interest upon his death and thus accomplish by this means that which he cannot possibly do by will?

This is the question which the Supreme Court of Pennsylvania was required to answer in the recent case of *Beirne v. Continental Equitable Trust Company*.¹ The husband being desirous of preventing his wife from having any interest in his personal estate upon his death consulted an attorney as to how he could legally accomplish this purpose and at the same time reserve the use of the property to himself during life and also retain control over it so that he could revoke any settlement he might then make.

He was advised that he could do this and the deed of trust was used as the means to enable him to do that which was utterly impossible for him to accomplish by a will. The court upheld the trust and thereby has made it possible for a husband in Pennsylvania, to nullify the statute which gives the wife an interest in the personal estate of the husband. The court in deciding this case has gone further than the courts of any other state in this country and much further than any of their previous decisions have gone. Is the decision sound? There is an excellent dissenting opinion filed by Judge Kephart in which he shows that the circumstances in this case show a gross fraud on the wife's dower rights, such a fraud as would unquestionably be sufficient to invalidate any other settlement.

³² Blackstone, Book II, Ch. 1, p. 15.

¹ 307 Pa. 570.

The statutes which this decision practically nullify are milestones on the long road which the law has traveled to give to the wife equal rights in the property which the husband has accumulated in his name by their joint efforts. Most legislatures have adopted them in response to progressive public opinion, which has slowly but surely come to recognize that the wife is not a mere chattel, but rather a human being possessing equal rights with the husband and entitled to an equitable consideration in any disposition of the property remaining in the husband upon his death.

It may be stated at the outset as a fundamental principle of the law that the husband has absolute dominion over his personal estate during his lifetime. Although in some jurisdictions, notably Michigan, Wisconsin, and Iowa, even this right is limited by the doctrine that he owes to his wife and family reasonable support and he may not so dispose of his property as to endanger this support. It is well that the law is such, for it would undoubtedly be against the best interests of society to limit unduly the right of alienation and thus put titles to personal property constantly in doubt. In *Lines v. Lines*,² the court said that "a man may do what he pleases with his personal estate during his life. He may even beggar himself and his family, if he chooses to commit such an act of folly. When he dies and then only do the rights of the wife attach to his personal estate."

If a man has a legal right to do a thing, the law will not inquire into his motive for doing it. We may grant the premise stated before as a true one but let us be certain that we have not overlooked the term "legal right," for it is on this point that this discussion centers. It is necessary in determining what action one may take with reference to a certain thing to examine carefully as to whether or not this so-called "legal right" upon which the act is based really exists. A legal right can never rest upon fraud.

Even in Pennsylvania, the Supreme Court, in deciding this case, has been very careful to state that a husband cannot dispose of his personal estate during life so as to commit a fraud on the wife's dower rights. This principle is so well recognized that there does not seem to be any doubt as to its being the law of all jurisdictions. But what constitutes fraud on the wife is the vital question in this discussion, and it is on this point that the Supreme Court of Pennsylvania parts company with all other jurisdictions, and, as the dissenting opinion of Judge Kephart points out, with the previous decisions of that court.

² 142 Pa. St. 149.

If there is fraud on the wife's dower rights in any disposition of the husband's personal estate during life, then such disposition is void as to the wife. The husband can give away his property during life, and he may do so for the express purpose of depriving the wife of any interest in it upon his death. He may so dispose of it as long as the gift is bona fide. As long as he acts in good faith and the disposition be not colorable, it is valid. The mere fact that the disposition of the property is for the sole purpose of depriving the wife of any interest in it upon the husband's death will not make it colorable. In *Williams v. Williams*,³ decided in 1887, the court said, "Can a married man give away his property during coverture for the purpose of preventing his wife from acquiring any interest therein after his death? The law seems to be that if such a gift is bona fide, and accompanied by delivery, the widow cannot reach the property after the donor's death." In *Windolph v. Girard Trust Company*,⁴ the court said, "The indispensable foundation for any limitation on his [the husband's] control is a fraudulent intent to defeat his wife's statutory rights as a widow. . . . If the gift is absolute and accompanied by a transfer of possession with intent to divest the donor of his ownership, although the obvious effect is to defeat the wife's . . . succession to the property at the donor's death, it is not fraudulent, and therefore invalid." This case is the basis of the decision in the Beirne Case, but let us note the words "with intent to divest the donor of his ownership." Also in *Smith v. Smith*,⁵ *Leonard v. Leonard*,⁶ *Stewart v. Stewart*,⁷ and *Mowbry et al. v. Mowbry et al.*,⁸ decided in 1872, it was held that a gift by the husband of his personal estate during coverture was valid although the effect was to deprive the wife of her dower rights.

But in all the above cases the absolute requisite to make such a gift valid is that the gift must be absolute. It must be final, irrevocable, and bona fide. The transaction must not be a mere devise to enable the husband to enjoy and control the property and still deprive the wife of her dower interest. It cannot be a cloak behind which he hides his fraudulent purpose to defeat his wife's interest. He may defeat her interest, but if he does, he must also give up something; he must actually part with his property. He may defeat the purpose of the statute but not

³ 40 Fed. 521.

⁴ 245 Pa. 349.

⁵ 12 Cal. 223.

⁶ 181 Mass. 453.

⁷ 5 Conn. 317.

⁸ 64 Ill. 383.

without paying the price which the law demands. If there remains any property in him upon his death, then the rights of the wife attach.

The good faith referred to in the disposition of the property has no reference to the intent to deprive the wife but rather to the intent of the husband to divest himself of the property. His purpose to deprive the wife is immaterial except as it may be evidence to show bad faith in divesting himself of the property. In the *Beirne Case*, the majority opinion refuses to consider it even as evidence of bad faith in the actual divesting of the husband of the property. In *Lines v. Lines*,⁹ the court interprets the "good faith" mentioned in *Dickerson's Appeal* to refer to the intent of the husband to divest himself of the ownership and not to the purpose to affect the wife—how can the motive concerning the wife, of the voluntary disposition of the husband, be material inasmuch as the wife has no right in the goods? We may accept as settled that the intent as to the wife has no bearing upon the question of fraud; the fraud that we are interested in is as to the passing of the property.

The question therefore resolves itself into what will constitute fraud on the part of the husband in divesting himself of his personal estate. Will the reservation of an interest by the husband brand the transaction as fraudulent as to the wife? In *Rabbitt v. Gaither*,¹⁰ the court says that a fraudulent intent as to the wife "may be proved and established by his [the husband's] retention of possession during his life, by a reservation of an interest to himself on the face of the conveyance, or by any outside agreement or arrangement" Also in *Dunnock v. Dunnock*,¹¹ the court holds such reservation bad. In Illinois, in the case of *Padfield v. Padfield et al.*,¹² the court, in holding a certain gift of the husband valid and not a fraud on the wife, said that had the husband retained any right of control over the property the gift would have been a fraud on the wife's rights and invalid. But in most jurisdictions this fact standing alone will not brand the conveyance as fraudulent.

Will the reservation of the right to revoke the deed of trust constitute a fraud on the wife? In *Rabbitt v. Gaither*, just cited, it was held that it would. *Padfield v. Padfield* holds likewise. In *Brownell v. Briggs*,¹³ the right to revoke was considered as

⁹ 142 Pa. 149.

¹⁰ 67 Md. 94.

¹¹ 3 Md. 140.

¹² 78 Ill. 16.

¹³ 173 Mass. 529.

establishing fraud. Florida,¹⁴ Vermont,¹⁵ and North Carolina¹⁶ treat such transactions as fraudulent as to the wife. We see that in many jurisdictions such fact as reservation of an interest or the reservation of the right to revoke will constitute fraud. In Mississippi, the court held that a deed of trust where the gift was absolute and irrevocable was not a fraud even though the husband reserved to himself the possession and control of the property during his life. "The only inquiry need be," said the court, "whether the deed of the husband is absolute and irrevocable or not."¹⁷

In *Stone v. Hackett, Executor, and Others*,¹⁸ the court said, "A power of revocation is perfectly consistent with the creation of a valid trust." The law in Virginia is to the same effect.¹⁹ But these cases simply decide that a right of revocation reserved in itself will not make the trust invalid; they do not hold that the reservation of such a right is not evidence to show fraud on the part of the settlor in the intent to divest himself of ownership.

If the gift is colorable then it is in fraud of the wife and will be set aside. What is a colorable deed? In deciding *Rabbitt v. Gaither*, already referred to, the court gave an excellent definition of what constitutes a colorable transaction. It says, "But on the other hand if the transfer be colorable merely,—that is to say, if it be a mere device or contrivance by which the husband does not part with the absolute dominion over the property during his life, but seeks thereby to defeat the claims of the widow at his death—the law pronounces it a fraud upon her rights; and this fraud may be proved and established by his retention of possession during his life, by a reservation of an interest to himself on the face of the conveyance, or by any outside agreement or arrangement between him and his grantee or donee to the effect that he shall receive the benefit of, or have the control over, the property during his life, or by any other fraudulent participation, on the part of the grantee or donee, to aid him in his purpose of defeating the rights which the law gives to his widow upon his death."

In *Poole v. Poole*,²⁰ the court said, "Where the transfer or gift [by the husband] is merely colorable and there is a voluntary

¹⁴ *Smith and Wife v. Wm. Hines, admr.*, 10 Fla. 258.

¹⁵ *Thayer v. Thayer*, 14 Vt. 107.

¹⁶ *McGee v. McGee*, 26 N. C. 105.

¹⁷ *Cameron v. Cameron et al.*, 10 Smedes & M. 394.

¹⁸ 78 Mass. 227.

¹⁹ *Lightfoot's Executors v. Colgin and Wife*, 5 Munf. (19 Va.) 42.

²⁰ 96 Kan. 84.

transfer or conveyance by which the husband reserves to himself an interest in or power to dispose of the property, it may be declared void as against the widow, and she may participate in its distribution." California likewise so holds. In *Niccolls v. Niccolls*,²¹ a deed by husband and wife, conveying in trust the property they might own at the death of the husband, which deed was to be effective upon the death of the husband, and which reserved the right to revoke, was held testamentary in character and ineffective to create a trust. In *McEvoy v. Boston Five Cents Savings Bank*,²² it was decided that where, under a trust created in bank deposits, the declarant could at any time during her life revoke it or could demand from the trustee all the money at any time to do with as she chose, the trust is invalid. In each of the above cases the attempted conveyances failed to pass the property to the trustee.

The foregoing cases do not necessarily rule that a right of revocation is inconsistent with the establishment of a valid trust, nor would a contrary decision in the Beirne Case have necessitated any such holding. That such a right reserved is one of the elements in the proof that the transaction was for the purpose of fraudulently defeating the wife's statutory rights seems to be the true rule. The right of revocation or the reservation of an interest must be considered in the light of other circumstances. If there is other evidence of fraud, then the right to revoke tends strongly to support the charge of fraud.

In his dissenting opinion in the Beirne Case, Judge Kephart says, "What the husband did in this case was to transfer to a third party, as trustee, personal property. He was to receive the entire income and all the benefits from this trust for his life. He had the right to control and manage it in the hands of the trustee. He could change the beneficiaries even to the day of his death. He had the right to revoke the trust and retake physical possession of the property at any time. In other words, his hand never left the property nor its benefits until his death severed the connection. He placed the property in the name of this third party as trustee solely to prevent his wife from having any share whatever in it after his death. It would seem to me that the mere statement of such facts ought to be sufficient in themselves to require a court of law to defeat the husband's purpose."

If it is possible to commit a fraud on the wife's dower rights in the personal property, how could it be done? If the above circumstances do not amount to such a fraud, what circumstance

²¹ 168 Cal. 444.

²² 201 Mass. 50.

would? Now, in this case, did the husband actually part with anything? What passed out of him? What is more evident than that this deed of trust was merely a device to deprive his wife of her dower right? It comes squarely within the definition of a colorable transfer as defined in *Rabbitt v. Gaither*. The husband had no intent to divest himself of the property but intended only to defeat his wife's interest. The deed was fraudulent, and no property passed to the trustee but remained in the husband and the trustee, and, upon his death, the wife's dower rights should attach.

The majority opinion in this case says, "A man can never be said to commit a fraud on the contingent rights of others, where it depends on his own act whether they shall ever exist. The rights of this woman [the wife], other than her common-law dower, he could defeat in the same manner he could the succession of his heirs." On this point, Judge Kephart says, "This conclusion is based on a false premise; her rights do not depend on his act, they exist through legislation, and they are not on the same, but on a much higher plane than those 'of his heirs.' . . . Heirs as such have no ground for claiming fraud as against a testator, but the right of the wife has always been regarded as protected until the decision in this case."

To hold that the circumstances in this case do not amount to fraud must result in admitting that the wife has no interest capable of being defrauded. This cannot be admitted because the courts of this country, including Pennsylvania, have repeatedly recognized that she does have such an interest. To deny the means of protecting a right is virtually to deny its existence.

COVENANT FOR RESTRICTION OF USE OF PROPERTY IMPOSED BY VENDOR AS RUNNING WITH THE LAND.—A recent case in Connecticut, *Dick v. Sears Roebuck and Company*,¹ affords interesting reflection on the subject of covenants running with the land and equitable restrictions. The facts may be briefly stated as follows:

The plaintiff for many years had been engaged in the furniture business in Danbury, in a building constructed primarily for and adapted to the retail furniture business. Some years later a partnership was formed, consisting of the plaintiff, his wife, and his son; and the business was continued on a partnership basis, the plaintiff, however, owning the greatest interest and assuming the management and control of the business.

¹ 160 Atl. 432.

During the continuance of the partnership, the plaintiff conveyed a lot of land across the street from his furniture store, inserting in the deed of conveyance a covenant in the following terms: "The grantees herein, by the acceptance hereof, covenant and agree on behalf of themselves, their heirs and assigns, that they will not rent the premises hereby conveyed for the purpose of conducting thereon a retail or wholesale furniture business, and that they will not permit the said premises to be so used for a period of 15 years from and after the date hereof, and said covenants and agreements are hereby declared to be made the joint and several covenants and agreements of the grantees."

Subsequent to this conveyance, the plaintiff incorporated his furniture business, but continued to manage it and to control the largest financial interest in the business. Thereafter, the grantees in the deed above mentioned, by deed incorporating a similar covenant, conveyed the premises to a corporation which constructed a building which was leased to the defendant for a period of ten years from May 1, 1929, for the sale and storage of merchandise. No reference was made in the lease to the covenant contained in the lessor's deed. In April of 1931, the defendant company, which operated a general department store, established a retail household furniture department which was extensively advertised and which drew a substantial patronage. Because of the direct competition created with, and the resulting loss to, the business conducted by the plaintiff's corporation, the plaintiff filed a bill as original covenantee, and not on behalf of the corporation, to enjoin the defendant from continuing to engage in the retail or wholesale furniture business in question.

The lower court granted the injunction prayed for, and the defendant appealed. The Supreme Court of Errors of Connecticut found no error in the decision, and the injunction was sustained.

The court held that the covenant ran with the land and was binding on the lessee, on the theory that the intent of the parties was unequivocally evidenced by the language of the deed that the covenant should be binding on the heirs and assigns, and that the covenant restraining the use to which the land could be put and which affected its value touched and concerned the land.

"There can be on question," said the court, "that when the plaintiff conveyed the premises . . . both he and his grantees intended that the covenant should be binding not only upon them but upon subsequent grantees of the property. This is indicated by the use of the terms in the covenant which bound not only the grantees, but also their heirs and assigns; as far as the plaintiff was concerned, its obvious purpose was to protect the furniture

business he was conducting across the street from competition, a purpose which would be easily defeated if the grantees might at any time convey the land free of the restriction; and as far as the grantees are concerned, their intent that the covenant should be binding upon their successors in title is shown by the insertion of an identical covenant in the deed by which they conveyed the premises. The language of the covenant and the surrounding circumstances mark it as one the burden of which was intended to run with the land, and this intent is an important element in determining its nature. . . . A covenant in a deed which restrains the use to which the land may be put in the future as well as in the present, and which might very likely affect its value, touches and concerns the land.

“The intent of the parties and the nature and form of the covenant established that it was a covenant real.”

The question of intent, so far as it relates to the opinion of the court may be briefly disposed of. Intent is unquestionably an important factor in determining the nature of a covenant, and whether it does or does not run with the land.² Where the covenant is of such nature and character that it may run with the land, the words “heirs and assigns” are not necessary or controlling if it can reasonably be inferred from the language of the instrument that the parties intended that the covenant should run with the land; but the absence of the words “heirs and assigns” or words of similar import, may be considered in arriving at the intent of the parties.³ Modern rules of interpretation give consideration, first, to the intent of the parties, and, second, to whether the covenant is such as can in consonance with policy and principle be impressed upon the land. The parties may by stipulation prohibit a covenant from running with the land, but they cannot make a covenant run unless it touches or concerns the land involved.⁴ Again, if the covenant cannot or does not run with the land, no words of assignment can create a privity of estate. If privity of estate is created, however, no words of assignment are necessary to carry the covenant to the assigns.⁵ In such case, the estate itself operates to carry the covenant.

² *Bradford Realty Co. v. Beetz*, 108 Conn. 26.

³ *Brockmeyer v. Sanitary District of Chicago*, 118 Ill. App. 49.

⁴ *Gibson v. Holden*, 115 Ill. 199.

⁵ Cf. *Spencer's Case*, 5 Co. Rep. 16a; *Gibson v. Holden*, 115 Ill. 199; *Frenseo Canal & Irrigation Co. v. Dunbar*, 80 Cal. 530; *Kettle River R. Co. v. Eastern Ry. Co. of Minn.*, 41 Minn. 461; *Brewer v. Marshall and Cheeseman*, 18 N. J. Eq. 337.

It appears from these authorities that if the covenant is of such nature as to run with the land, that is, if it touches and concerns the land, then, if the parties so intend (the intent being gathered from the language of the instrument and the surrounding circumstances) that the covenant should run, it will be given that effect. These two elements are sufficient, but are mutually dependent. The use of words "heirs and assigns" and the like, which go only to indicate the intent, is not necessary if the above two elements exist, or if there is privity of estate. In either case, the right or duty in connection with the covenant is carried over so as to bind the subsequent assignees.

In construing the covenant under consideration, the employment of the words "heirs and assigns," together with the other language contained in the deed, and the obvious purpose of the covenant—the benefit to the plaintiff's business across the street—can reasonably be said to show an intention on part of the original parties to the covenant that it should run with the land and be enforceable against all subsequent assignees. The covenant would otherwise have been ineffectual, a result which, when considered in light of all the circumstances, would not seem to have been in the contemplation of the parties at the time of making the covenant. That they intended the covenant to be operative during the entire period of fifteen years, even in the hands of assignees, would seem a necessary conclusion.

The Connecticut court has seen fit to decide the question whether or not the covenant is of such a nature as to run with the land. As will be pointed out later on, the determination of this question would seem really unnecessary in dealing with the covenant under consideration, because of the fact that the doctrine of equitable restrictions and the enforceability of covenants in a court of equity does not depend upon the nature of the covenant, except in a few jurisdictions. However, following out the theory of the court that the covenant ran with the land, assuming the intent, and granting the formal sufficiency of the instrument, the question then arises, does the covenant touch and concern the land? This is a material inquiry whenever an attempt is made to treat the covenant as one running with the land, and if the covenant fails to meet with the requirements in this connection, intent or words of assignment cannot, as already shown, be controlling.

The court states that a covenant in a deed which operates to restrain the use to which the land may be put "in the future as well as in the present, and which might very likely affect its value" is one which touches and concerns the land. Ordinarily a covenant is regarded as touching and concerning the land if

it is of value to the covenantee by reason of his occupation of the land, or by reason of an easement which he has in the land, or if it is a burden on the covenantor by reason of his occupation of the land.⁶ It is said in *The Natural Products Company v. The Dolese and Shepard Company*:⁷ "The test whether a covenant runs with the land or is merely personal is whether the covenant concerns the thing granted or the occupation or enjoyment of it or is a collateral and personal covenant not immediately concerning the thing granted."

That the covenant was a burden on the covenantor by reason of his occupation of the land is readily apparent. It limited the use to which the land could be put by prohibiting the defendant from conducting a furniture department. This restriction indeed affected the value of the land by limiting the mode of its enjoyment during the fifteen years, and operated to the benefit of the plaintiff, the covenantee, who was conducting a furniture business across the street.

Restrictive covenants, those which restrict the use to which the land may be put, are generally held to be covenants running with the land,⁸ so that the assignee may be bound by the burden impressed by means of the covenant; and the same doctrine is generally applicable to covenants which tend to restrict competition in trade,⁹ so long as the restrictions are not unreasonable or violative of public policy.¹⁰ There are a few cases, however, which afford interesting comparisons with the case under consideration, which hold that a restriction against competitive business will not run with the land.¹¹ Well known among these is *Norcross v. James*.¹² In that case the owner of a quarry and surrounding lands conveyed the quarry to another and covenanted not to open or permit to be opened any quarry on his remaining land.

⁶ Tiffany, *Real Property*, II, sec. 392.

⁷ 309 Ill. 230.

⁸ Restrictions as to height and construction of dwelling houses, *Parker and others v. Nightingale and another*, 88 Mass. 341; *Bauby v. Krasow*, 107 Conn. 109; building line restrictions, *Withers v. Ward*, 86 W. Va. 558; *Wiegman v. Kusel*, 270 Ill. 520; covenant to keep plot as a park, *Town of Amherst v. Gates*, 233 Mass. 583; prohibiting stone crushing, *The Natural Products Company v. The Dolese & Shepard Company*, 309 Ill. 230. See *Hodge v. Sloan*, 107 N. Y. 244; *Pollard v. Shaffer*, 1 Dall. (Pa.) 210.

⁹ *Frye v. Partridge*, 82 Ill. 267; *Watrous v. Allen*, 57 Mich. 362; *Stines v. Dorman*, 25 Ohio St. 580.

¹⁰ *Milanesio v. Calvanese*, 92 Conn. 641; *Styles v. Lyon*, 87 Conn. 23.

¹¹ *Taylor v. Owen and others*, 2 Blackf. 301; *Brewer v. Marshall and Cheeseman*, 18 N. J. Eq. 337; *Kettle River R. Co. v. Eastern Ry. Co. of Minnesota*, 41 Minn. 461; *Tardy v. Creasy*, 81 Va. 553.

¹² 140 Mass. 188.

Through mesne conveyances, both properties passed into other hands, and the assignee of the covenantor opened a quarry in disregard of the covenant. An injunction was denied the assignee of the covenantee. Justice Holmes, writing for the court, said: "The principle of policy applied to affirmative covenants applies also to negative ones. They must 'touch or concern' or 'extend to the support of the thing' conveyed. . . . They must be 'for the benefit of the estate.' . . . Or, as it is said more broadly, new and unusual incidents cannot be attached to land by way either of benefit or of burden. . . . The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked what is the difference in principle between an easement to have land unbuilt upon, . . . and an easement to have a quarry left unopened, the answer is that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to the direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned."

It would appear from a cursory examination of the foregoing decision that a contrary result would follow in the case under consideration if the same test of "touching and concerning" were to be applied. Unquestionably the test there resorted to would color the covenant in the Connecticut case as one merely concerning the land in an indirect way and not one which "looks to the direct physical advantage in the occupation of the dominant estate." *Norcross v. James* is to be explained, however, on the ground that in Massachusetts, and the other jurisdictions in accord, the burden of a covenant will not be impressed on the land except by way of easement or servitude created in favor of an adjoining tenement, or in aid of such a grant.¹³ It is only by this means that "new and unusual incidents" may "be attached to the land by way either of benefit or of burden" and thus "touch and concern" the land or tend to the "physical advantage in the occupation." Holmes's language in the above case is rather clear in indicating the requirement of an easement to attach the burden. The whole idea in this small group of cases is very well stated in a few words by the court in *Brewer v. Marshall and Cheeseman*.¹⁴ "But the exclusive right of carrying

¹³ See *Lincoln v. Burrage*, 177 Mass. 378.

¹⁴ 18 N. J. Eq. 337.

on a trade upon one lot is not an easement; and although a covenant not to carry on such trade upon his adjoining property may bind the covenantor, he cannot make it a servitude upon that property, so as to burthen it in the hands of purchasers." Considering these cases in light of the requirement pointed out above, the distinction between them and the Connecticut case is readily perceived. Further explanation of the apparent antithesis between these two classes of cases, is also to be made in connection with the requirement of privity, which is hereafter discussed.

The equitable doctrine of the enforcement of covenants should next be considered before carrying the discussion any further. Where the remedy available to the plaintiff in a court of law is not adequate, equity may be resorted to for injunctive relief or specific performance of the covenant, although it is not of such character as to run with the land according to strict legal principles. In *Tulk v. Moxhay*,¹⁵ which is generally cited as the leading case on the subject, it is said that "the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. . . . That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

The application of this doctrine is well evidenced by the case of *Frye v. Partridge*,¹⁶ wherein one Lewis sold an eight acre tract of land on one bank of the Illinois River to Gibson, who covenanted for himself, his heirs and assigns not to establish a common ferry-boat landing on such land, to ply between there and the opposite shore, without the consent of the grantor, his heirs or assigns. Lewis subsequently sold land on the opposite bank to Frye who procured a charter and began the operation of a ferry across the river. The complainant obtained these lands by devise from Frye. The defendant, who had inherited the eight acre tract from Gibson, obtained a license and began the operation of a competitive ferry-boat line. The defendant, because his claim of title was through the deed to Gibson which

¹⁵ 2 Ph. 774.

¹⁶ 82 Ill. 267.

contained the covenant, took with notice of that agreement or restriction. The court in holding the defendant bound by the covenant said:

"Whether the covenant contained in the deed is one that will run with the land upon which an action at law might be maintained, is a question that it will not be necessary to consider or determine; but the real question presented is, whether the covenant or contract contained in the deed can be enforced in a court of equity against a subsequent purchaser, under a chain of title from Coleman J. Gibson, with notice of the covenant in the deed under which Gibson obtained title.

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"When a vendee purchases with full notice of a valid agreement between his vendor and the original owner, concerning the manner in which the property is to be occupied, it is but a reasonable and equitable requirement to hold him bound to abide by the contract under which the land was conveyed. . . . It was within the power of a court of equity to enjoin him from using the land in a manner and for a purpose actually prohibited by the terms of one of the deeds which is a link in the chain of title under which he holds the land."

The two obvious elements in cases of covenants of this character which support the jurisdiction of a court of equity and the application of the equitable doctrine, are, first, a valid agreement or covenant between the original parties, and, second, actual or constructive notice on part of the purchaser or lessee. The notice necessary to bind the subsequent grantee or lessee need only be constructive, and if the covenant or restriction is contained in a deed or other instrument in the chain of title through which he claims, the purchaser is bound with notice thereof.¹⁷ A third element is imposed by some courts, as has been shown,¹⁸ which negatives the operation and usefulness of the equitable doctrine. When a court holds that the covenant must touch and concern the land, and that the burden must be imposed by way of easement, it is requiring an element which of itself operates to carry the covenant so as to bind the assignee and, consequently, is not in a position to resort to the equitable doctrine which ignores that very consideration.

The court in *Kettle River Railroad Company v. Eastern Railway Company of Minnesota*¹⁹ states the position of the courts

¹⁷ Willoughby v. Lawrence, 116 Ill. 11; Sjoblom v. Mark, 103 Minn. 193; Bauby et al. v. Krasow et al., 107 Conn. 109.

¹⁸ See footnote 11.

¹⁹ 41 Minn. 461.

above referred to: "That the plaintiff, as a common carrier, should have a monopoly of the transportation of the freight to and from the quarries is not a privilege affecting the land of either party to the covenant, except in a collateral way, though it might very seriously affect the amount and value of its freight business, and have been the chief inducement for constructing the road. In other words, equity follows the law in that it will not enforce a covenant as against the heir or assignee unless the obligation it imposes is one which attaches to or concerns the land or its use or mode of enjoyment." And in *Taylor v. Owen*,²⁰ the court said: "We consider the mere circumstance of a lessee's having notice of a covenant like the present, to be of no more consequence to his interest in the premises than the knowledge of the lessor's having contracted a debt would be. A bona fide vendee or lessee of real property, for a valuable consideration, has nothing to do with these personal contracts."

It is suggested in *Brewer v. Marshall*²¹ that even though there is present the element of notice, equity should act hesitatingly and not enforce such a covenant (a covenant not to sell marl from the remaining lands of the grantor). Otherwise, it is said, equity would be causing the burdens to run, which is contrary to the "general rule," unless there is an easement or the like.

These several cases are in accord with *Norcross v. James* and present the doctrine adopted by a few jurisdictions in this country, a doctrine which, it is submitted, does not seem to be in harmony with recognized equitable principles.

Returning to the Connecticut case, and applying the rule that the purchaser or lessee is bound if he takes with notice, it is to be observed that a decision is to be readily reached. In the language of the court, "The deeds being of record, the defendant was bound with notice of the covenants contained in them though its lease did not refer to them." As to the validity of the agreement, the court says, "Such a restriction as is contained in it is not invalid; a restriction upon the conduct of a certain business upon a particular piece of land for a reasonable purpose and covering a reasonable period does not violate public policy." The existence and sufficiency of the two elements necessary to the application of the equitable doctrine having been thus passed on by the court, whether or not the covenant ran with the land would seem to be a collateral question having no essential bearing upon the determination of the case, and one which need not have been considered by the court. Throughout the opinion of the court, no specific mention is made of the covenant being en-

²⁰ 2 Blackf. 301.

²¹ 19 N. J. Eq. 537, affirming 18 N. J. Eq. 337.

forced by reason of the doctrine applicable in a court of equity, and only from the two statements quoted above with reference to notice and the validity of the covenant, can be inferred that the court had in mind, or was relying in any degree upon, such a doctrine. It becomes necessary, therefore, further to consider that case on the theory that the covenant ran with the land.

In *Stines v. Dorman*,²² where the court was dealing with a covenant not to operate a hotel for transient or public trade, it is said: "The stipulation relates to the mode in which the premises conveyed are to be enjoyed, and qualifies the estate. This limitation on the use enters into the consideration of the conveyance; and if not unlawful, it ought, upon plain principles of justice, to be enforced. . . . If the effect of the stipulation is not to accomplish an illegal purpose, it is lawful; and where it affects the land or the mode of its enjoyment, its effect is to bind all deriving title under the conveyance in which the restriction is found."

There can be no question but that the covenant not to conduct a rival furniture business was one which affected the mode of the enjoyment of the land by the covenant that it was a burden on the covenantor by reason of his occupation of the land; that it affected the use to which the land could be put during the fifteen year period; and that it operated to the benefit of the covenantee. Not being bound or limited by a doctrine requiring the existence of an easement or servitude in order to hold that the burden of the covenant ran with the land, the court was within just bounds when it held that the covenant "touched and concerned" the land.

It is said that there is no reason for restricting covenants by applying the rule of "touching and concerning in an overtchnical manner, which is unreal from the standpoint of the parties themselves. Where the parties, as laymen and not as lawyers, would naturally regard the covenant as intimately bound up with the land, aiding the promisee as landowner or hampering the promisor in similar capacity, the requirement should be held fulfilled."²³ Although the doctrine submitted by Clark is not controlling, it indicates the leniency which should characterize judicial decision where a close question is involved, so long, of course, as there is no element of unfair competition, monopoly, or public policy involved in the covenant restricting the trade or use to which the land may be put.

²² 25 Ohio St. 580.

²³ Charles E. Clark, *Real Covenants and Other Interests which "Run with Land,"* pp. 78-79.

Considering the nature of the covenant in light of the foregoing statements, position of the Connecticut court in holding that the covenant ran with the land is to be approved.

The next element or requirement of a covenant real is that there be privity of estate. Privity of estate is the connection of interests by means of estates in property. In cases of easements and the like, the right or duty—the benefit or burden—passes to whosoever has the land as being part of the land itself. In such case, no privity of estate would seem to be necessary to carry to successive assignees the attendant burden or benefit. But in case of covenants there must be succession of interest to one of the parties to the covenant, although not to both.²⁴ In such case, it is only the assignment of the covenant—the estate—and not the land itself that carries the resulting right or duty, and hence, to entitle one to enforce such right or duty, one must stand in privity of estate.²⁵ Holmes says, "Privity of estate, as used in connection with covenants at common law, does not mean tenure or easement; it means succession to a title. It is never necessary between covenantor and covenantee, or any other person except between the present owner and the original covenantee. And on principle it is only necessary between them in those cases—such as warranties, and probably covenants for title—where, the covenants being regarded wholly from the side of contract, the benefit goes by way of succession and not with the land."²⁶

The covenant with which we are dealing is one which would seem to be impressed by way of contract, and which would pass only by the estate and not by the land itself, although the Connecticut court treats it as one which by its nature runs with the land. An interesting explanation in this connection is found in the language of Holmes, who has pointed out the distinction made in the old law between covenants properly running with the land and those which are regarded in the light of contract, and which must pass only by succession of the estate. "The discussion of the question under what circumstances a landowner is entitled to rights created by way of covenant with a former owner of the land has been much confused since the time of Lord Coke, by neglecting a distinction, which he stated with perfect clearness, between those rights which run only with the estate in the land and those which are said to be attached to the land

²⁴ *Wead v. Larkin et al.*, 54 Ill. 489; *Mott v. Oppenheimer*, 135 N. Y. 312.

²⁵ O. W. Holmes, Jr., *The Common Law*, p. 371 et seq.

²⁶ *Ibid.*, p. 404.

itself.”²⁷ Again, “Later writers, however, have wholly forgotten the distinction in question, and accordingly it has failed to settle the disputed line between conflicting principles. Covenants which started from the analogy of warranties, and others to which was applied the language and reasoning of easements, have been confounded together under the title of covenants running with the land. The phrase ‘running with the land’ is only appropriate to covenants which pass like easements. But we can easily see how it came to be used more loosely.”²⁸

Any indiscrimination which has been committed in this connection is excusable by the weight of judicial sanction, though not, perhaps, soundness. In the principal case, however, even when considered in this respect, there is the necessary succession of estate to sustain the requirement of privity by succession of title to enable the original covenantee to hold the defendant. This is provided by the direct succession of the estate from the covenantee through the covenantor to the present lessee of the premises.

It was intimated in dealing with the nature of the covenant that *Norcross v. James* was to be further distinguished on principles of privity. It is submitted by Tiffany²⁹ that, in that case, there was no simultaneous existence of two distinct interests in the land, in the covenantor and the covenantee, and that, consequently, succession to the interests of the parties to the covenant would not permit the assignee of the covenantor to be held because of the lack of privity of estate. It would follow from this that unless the situation of dominancy and serviency is actually supported by easements or servitudes, etc., succession by way of title is of course impossible if we are to require the simultaneous existence of distinct interests in the land. This is *Norcross v. James*.

The term privity of estate is used in three distinct senses: first, succession to the estate of one of the parties to the covenant; second, succession of estate between covenantor and covenantee; third, mutual or simultaneous interests in the same land. Applying the facts of the instant case, it is apparent that as to the first sense there is no difficulty involved, because the original covenantee himself is suing the assignee of the covenantor. There is also privity by succession of estate between the covenantee and the covenantor so as to satisfy the test set forth in the second type. The third sense in which the term is used is

²⁷ *Norcross and others v. James and others*, 140 Mass. 188.

²⁸ Holmes, *The Common Law*, p. 400.

²⁹ Tiffany, *Real Property*, sec. 391.

of importance only in those states, such as Massachusetts, which require mutual or simultaneous interests in the same land, and hence, for differences already pointed out, it has no application.

On principle and authority, privity in the sense of succession to the estate of one of the parties to the covenant seems the only proper use of the term,³⁰ and as to this, the instant case, as already shown, meets with every requirement:

Having concluded in the foregoing discussion that the intent of the parties was clear that the covenant should be binding on assignees, and that the covenant touched and concerned the land, it follows that the court was correct in holding that the covenant ran with the land. Having also concluded that there was privity of estate between the covenantee and the defendant in the sense of succession to the estate of one of the parties to the covenant, it also follows that the complainant, the covenantee, was entitled to enforce the covenant. The decision of the court, therefore, stands uncorrected. The suggestion before made, that the court could have treated the case without considering the question whether the covenant ran with the land, by applying the equitable doctrine of notice, is again urged and is submitted as the simplest theory on which the court might have sustained its decision.

³⁰ Clark, *Real Covenants and Other Interests which "Run with Land,"* p. 91.